United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 1508.

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JAMES N. SPARKS, APPELLANT,

vs.

FANNIE P. SPARKS.

BRIEF FOR APPELLEE.

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Statement of Facts.

The bill filed by the appellee *in forma pauperis*, in the court below, against her husband, the appellant, prays for support and maintenance, alimony *pedente lite*, and counsel fees.

It is accompanied by supporting affidavits and alleges that the parties were married in 1871 and lived together until March, 1901, the wife now being more than fifty-two (52) years old; that she left her husband in March, 1901, and in the following May filed a bill against him for an absolute divorce on the grounds of cruelty and adultery, which suit was dismissed because the proof was insufficient to support the allegations; that there are no minor children, the two daughters being both of full age; that the health of the wife is "most miserable;" that the husband has contributed nothing to her support since the spring of 1902, leaving her solely dependent upon her meagre earnings, which have been realized from daily labor secured at irregular intervals, and which she has had to divide with her younger daugh-

ter, who is delicate physically, and which would have been insufficient for their subsistence but for the assistance received from their friends; that she is absolutely penniless, and that her husband is now and has been for several years employed at a salary of fourteen hundred dollars ($1,400) a year in the Government Land Office; that on September 6, 1904, she proposed a reconciliation between herself and husband and besought him to take her back to his home, and if unwilling to do so, to contribute something to her support; that she is ready to resume their marital relations and discharge her duties as a wife, but the husband has ignored her communications and refused to resume marital relations with her (Rec. pp. 1–3).

On October 18, 1904, she filed a motion accompanied with affidavits for alimony *pendente lite*, counsel fees, and suit money (Rec. pp. 6–8). By way of answer to said motion the defendant filed an affidavit setting up that his wife deserted him on the 13th day of March, 1901, referring to the suit filed by her against him (equity cause No. 22,300); alleging that the charges made against him were disproved, that he is justified in refusing to accept the alleged reconciliation with his wife, and that the statutory period necessary to give him a divorce for desertion had elapsed since she left him (Rec. pp. 27–28). He also filed two pleas, *one* to the effect that on May 20, 1901, the complainant filed her bill against him, praying for an absolute divorce, for alimony *pendente lite*, permanent alimony, attorney fees, and costs, and that the said bill was dismissed; the *other plea* was to the effect that the complainant deserted the defendant on March 13, 1901, and had never since communicated, directly or indirectly, in reference to a reconciliation until the writing of the letter dated September 6, 1904, a greater period than the statutory time of desertion for which he is entitled to a divorce (Rec. pp. 8–10).

A copy of the bill in equity cause No. 22,300 (Rec. pp. 11–26), and the decree ordering "that the prayer of the said

bill for a divorce is hereby denied, and the complainant's said bill be and the same is hereby dismissed " (Rec. p. 10), are filed as exhibits.

After hearing upon the motion the court passed an order allowing alimony *pendente lite* at the rate of twenty-five dollars ($25) per month, and fifty dollars ($50) counsel fees (Rec. p. 28). From this order an appeal was taken (Rec. p. 28).

After the appeal had been noted, but before the appeal bond had been approved or filed, the complainant moved the court to require defendant to allow her a reasonable sum for counsel fees and expenses to defend the appeal taken from the order allowing temporary alimony and counsel fees (Rec. p. 18). The court then passed the order allowing seventy-five dollars ($75) to cover costs of printing brief and fees of counsel in the Court of Appeals (Rec. p. 31). From this order an appeal was also taken (Rec. p. 32). Both appeals are now before this court for consideration.

No brief or assignment of error having been filed or furnished the appellee by the appellant, it is not known what grounds of error will be insisted upon. We shall therefore discuss the two appeals in order.

FIRST APPEAL.

I. The order granting alimony pendente lite was properly passed by the court, without consideration of the merits of the husband's defense.

The merits of the husband's defense and the sufficiency of his pleas have not been passed upon by the court below. The appeal is not from a final hearing, but from a decree allowing a sum to provide a proper presentation of the wife's case upon such a final hearing, and for her support until such hearing can be had.

There can be little, if any, controversy about the reasonableness of the sums directed to be paid by the husband. He has an annual salary of fourteen hundred dollars ($1,400) a year, and no one dependent upon him. By the decree he is directed to pay twenty-five dollars ($25) a month to his wife, and fifty dollars ($50) as a fee to her attorneys.

Assuming the reasonableness of the amount granted, but two things need appear to authorize the court to pass the order appealed from:

(1) That the suit for maintenance was pending, and

(2) That the bill and affidavits filed by the wife *prima facie* showed the necessary requisites to the granting of alimony *pendente lite*, namely, marriage, separation, necessity of wife, and ability of husband.

> "It was the universal practice of the ecclesiastical courts in England, and is now generally the practice in the United States, upon an application by the wife to the court, in a divorce suit, to make an allowance for her support during the pendency of the suit, and for costs and expenses to enable her to properly carry it on, if she is without separate means and the husband is able to support her, whether she be libelant or respondent, without a consideration of the merits of the case."
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> 2 Am. & Eng. Ency. of Law (2d ed.), p. 100.

> "The English rule, therefore, is that when a suit is instituted by or against the wife, and the plaintiff's allegation is admitted, or the husband has acknowledged, or she has proved the fact of marriage, she is at once, on establishing his faculties, entitled to a decree for her *ad interim* alimony and costs, no other condition being imposed upon her. This simple rule seems admirably just and seems to cover the entire ground of reason on which the allowance of alimony and costs *ad litem* is based."
>
> 2 Bishop on Marriage and Divorce (5th ed.), sec. 423.
>
> See, also, section 384.

NECESSARY PREREQUISITES.—(a) *Marriage*—"The rule that the court will not inquire into the merits of the case upon an application for alimony *pendente lite* will not preclude an examination as to the existence of the marital relation, but, on the contrary, as the existence of the marriage is the very ground of the application, it must be admitted or shown before a decree or order can be made for an allowance."

(b) *Separation*—"From the very nature of the case it must appear that the parties have separated and are living apart before the court can interfere and grant an allowance for the separate maintenance of the wife."

(c) *Wife's Necessity*—"It must appear that the wife is without the means to maintain herself and to enable her to properly conduct her suit or defense. When it is shown that she has sufficient means, alimony *pendente lite* will not be allowed."

(d) *Husband's Ability*—"As a further prerequisite as to the allowance of alimony *pendente lite*, it must be admitted or proved that the husband is able to pay such sum as may be decreed."

2 Am. & Eng. Ency. of Law (2d ed.), 103, 105, 107.

Certainly all of the prerequisites to the granting of alimony *pedente lite* appear on the face of the bill. The court was, therefore, authorized to pass the order granting alimony *pedente lite*, and was not required to pass upon the sufficiency of the pleas, or to determine upon the preliminary motion whether there was anything in them as a defense that would defeat the plaintiff's right to alimony.

II. There is nothing in the pleas, even if considered, that would defeat the plaintiff's right to alimony pendente lite.

1. *The plea of res judicata constitutes no defense to the complainant's claim.*

(*a*) The facts set up by the plea of res judicata, if admitted and considered, do not bar the complainant's right to alimony.

The decree referred to in the plea expressly passes upon one thing, namely, the right *of* the wife to an absolute divorce. It reads: "The prayer of the bill *for a divorce* is denied." It was not necessary to decide that the husband was not at fault. The decree does not say that the wife is not justified in separating herself from her husband, or that she was not entitled to support and maintenance. It simply denies the prayer for divorce, and passes in silence the question as to wife's right to apply for such support and maintenance at a future time. In such a case the doctrine of res judicata has no application and can not properly be invoked to defeat the right of the wife to support and maintenance.

In the Duchess of Kingston's case, 20 How. St. Trials, 538, it was said:

> "Neither the judgment of a (court of) concurrent or exclusive jurisdiction is evidence of any matter which came *collaterally* in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."
>
> "The rule does not extend to every issue that may have been determined in the former suit. It extends *only to those which were necessary to the disposal of the matter involved.*"
>
> 24 A. & Eng. Ency. of Law (2d ed.), 768.
>
> "Hence, a judgment can not be pleaded in respect to matters only collaterally or incidentally considered."
>
> Idem, 772.
>
> "Even where the matter was in issue, if the issue was not determined, by reason of the decision turning upon some other point or otherwise, there is no estoppel."
>
> Idem, 776.

> "In divorce cases . . . the interlocutory or incidental portion of the decree should continue to remain indefinitely under the control of the court. Decrees of divorce from the bond of matrimony adjudicate only one permanent right—the right of the complainant to have the marriage dissolved and to be in law placed in the position of an unmarried person, but there is no right of property involved and none is adjudicated. The decrees affect the status of the parties, not necessarily their financial affairs. There is but one contract in controversy, the contract upon which the matrimonial relation is based."
>
> Alexander *vs.* Alexander, 13 App. D. C. 334.

The decree in equity cause No. 22,300 adjudged only one thing, namely, that the wife was not entitled to an absolute divorce; in other words, that she was still the wife of the appellant. Only to this extent can the decree be pleaded as an estoppel. The fact that she is not divorced, but is still his wife, can not adversely affect her right to support and maintenance.

(*b*) The fact that conditions have changed since the decree was passed would make the doctrine of *res judicata* inapplicable, even if it were not so otherwise.

If for the sake of argument it be admitted that the right to alimony was passed upon by the first decree, a different state of facts existed when the second bill was filed. The wife had tendered herself ready to return and had sought a reconciliation with her husband. So that if her right to alimony before the offer of reconciliation was made had been adjudicated, such can not be said of her right to alimony *after* the offer.

> "An adjudication is conclusive only as to those matters capable of being controverted between the parties at the time and as to the conditions then existing, and can not operate as an estoppel to any

> action or proceeding which though involving the same rights passed upon is yet predicated upon facts which have arisen subsequent to the former adjudicati n."
>
> 24 Eng. & Am. Ency. of Law (2d ed), p. 777.

(c) The doctrine of of res judicata does not apply to the question of alimony, which continues indefinitely under the control of the court.

In the case of Alexander *vs.* Alexander, cited above, it was held by this court that even where an absolute divorce has been granted, the court still retains control of questions relating to alimony and may suspend, increase, or diminish the amount allowed the wife at the time of the granting of the decree of divorce.

In cases where alimony *pendente lite* or permanent alimony upon a decree of divorce *a mensa et thoro*, or decree without divorce has been allowed, the courts have expressed no doubt as to their power to increase, diminish, or suspend the amount granted for cause shown at any time.

2 Am. & Eng. Ency. of Law, 135.

> "The authorities appear to be unanimous to the effect that the adjudication (allowing alimony) was a continuing one, and that the courts retained the whole subject under their control, increasing or diminishing the amount of alimony from time to time as might seem just under changed or changing circumstances, and this without reference to the fact that the original decree might have been entirely silent in regard to the reservation of right to the parties, or either *of* them, thereafter to apply to the court for a modification."
>
> Alexander *vs.* Alexander, 13 App. D. C. 334–346.

If it be true that where a divorce has been granted and the question of alimony expressly passed upon, the matter still remains under the control of the court and the plea of

res judicata would not apply; it would seem that there should be no question about the right of the court at any time to hear the application in a case where the wife still remains a wife, where the matrimonial relation continues to subsist, where the moral obligation of the husband to support her still remains, and especially in a case where the right of the wife to support and maintenance has not been expressly passed upon, and where since the decree in question was passed conditions have changed in the situation of the husband and wife and in their relation towards each other.

2. *The plea of desertion by the wife is no bar to her right to alimony pendente lite.*

(*a*) It is not admitted by the pleadings, nor was it determined in the former proceedings, that the complainant's leaving her husband's house was under circumstances that would entitle him to a divorce if she remained away. The court merely decided that the circumstances under which she left did not entitle her to a divorce. As to the allegation that the offer of reconciliation was not made until after a greater period than the statutory period of desertion, it has been held by this court that there is no statutory period of desertion in the District.

Maschauer *vs.* Maschauer, 23 App. D. C. 87, 95, 96.

But whatever may finally be determined by the court as to the alleged desertion and its effect, until the fact that such desertion entitles the husband to a divorce has been judicially determined, she is still his wife and, under the authorities already cited, as such is entitled to alimony *pendente lite*, notwithstanding any allegations as to such desertion or other misconduct that may be made by the husband.

See, also, 2 Am. & Eng. Ency. of Law (2d ed.), 108.

(*b*) But there is a still more conclusive reason why the facts set up in the plea of desertion, if true, would not make it improper for the court below to pass the decree appealed from.

The Code provides as follows:

> "Sec. 976. When a divorce is granted to the wife the court shall have authority to decree her permanent alimony sufficient for her support and that of any minor children whom the court may assign to her care. Sec. 977. If the divorce is granted on the application of the husband, *the court may, nevertheless, require him to pay alimony to the wife, if it shall seem just and proper.*"

Of similar statutes it has been said:

> "In order that the offender may not become an outcast from society, and upon the further humane and moral ground that the wife may not be tempted to continue in a course of vice, it is provided by statute in many of the States that the husband must make provision for his erring wife upon divorce from him, and under statutes providing generally that when a divorce is decreed the court may make such an order as to the maintenance of the wife as may seem necessary and proper, it is held that the court may make provision for the guilty wife."
>
> . . . . . .
>
> "And where the entire blame does not rest on the wife, but the husband is partly in fault, this should be considered and an allowance should be granted."
>
> 2 Am. & Eng. Ency. of Law, 119–120.

It is clear under the sections of the Code referred to, that if the husband had actually instituted his suit for divorce (which he has not begun) and had proved the desertion alleged by the plea; if he had proved that it was the fault of the wife, that it had come about under such circumstances and had continued for such a length of time, that he was

entitled to a divorce, still it would be in the power of the court to decree permanent alimony, if the necessity of the wife and the ability of the husband justified it And if such a decree had been passed, this court would not disturb it, unless the court below had acted oppressively or abused its discretion.

The case of the appellee is much stronger. She has not been adjudged guilty of misconduct; it has not been determined that the husband is entitled to a divorce; she is still his wife; the decree appealed from grants her what it is the universal practice of the courts to grant, namely, the means by which she may have her rights determined.

The case is one that appeals with peculiar force to a court of conscience. A woman feeble and growing old, without means of support, who as the wife of the appellant lived with him for thirty years, who bore his children and reared them to maturity, offering to forgive the past and bury the differences that have temporarily estranged them, seeks the protection and support which the husband is pledged to give her, and which he is able to supply.

The words of Judge Schofield, in Deenis *vs.* Deenis, 79 Ill. 74, where a husband was given a divorce on the grounds of desertion, are peculiarly applicable:

> "It is equitable that the husband out of his abundance should contribute to her support to prevent her from becoming a burden upon others, even if her conduct had been far more objectionable than it is proved to have been."

SECOND APPEAL.

The second appeal is from the order of November 23, directing the appellant to pay to the appellee $75 to cover costs of printing brief and counsel fees in the Court of Appeals in defending the appeal from the decree granting

alimony *pendente lite* and counsel fees in the court below (Rec. p. 29).

The order was a proper one, and there was no error in passing it.

> "The wife, in the court below, is entitled to such an order whenever it is shown that she has a meritorious case on appeal, whether she is the complainant or defendant, and when it is made to appear that she has not enough money to enable her to prosecute her suit, and that the husband has sufficient means to pay such an allowance as may be made."
>
> 2 Am. & Eng. Ency. of Law (2d ed.), 110.

> "To enable the wife to carry on or defend the action is one of the purposes to be subserved by granting alimony *pendente lite*, and the need of it is quite as obvious after the judgment and pending the appeal as before. It could not have been contemplated that before judgment the wife should be aided in maintaining her rights, but, after judgment in her favor, should be left to starve during the pendency of an appeal, and should be disarmed by her very success from defending the judgment in her favor."
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> McBride *vs.* McBride, 119 N. Y. 519–521.

It is customary for the courts to pass such orders whether the decree appealed from is in favor of or against the wife. They may, as a rule, be passed either by the trial or appellate court, though they are generally made by the trial court. In a few jurisdictions it has been held that the application may not be entertained when first made in the appellate court.

2 Am. and Eng. Ency. of Law (2d ed.), 110.

The following cases fully illustrate the rule and show

that the order under consideration was in all respects a proper one:

Rohrback *vs.* Rohrback, 75 Md. 317.
Van Voorhis *vs.* Van Voorhis, 90 Md. 276.
Pleyte *vs.* Pleyte, 15 Colo. 125.
Goldsmith *vs.* Goldsmith, 6 Mich. 284.
Clarkson *vs.* Clarkson, 20 Mo. App. 94.
Lake *vs.* Lake, 16 Nevada, 364.
Jenkins *vs.* Jenkins, 91 Ill. 167.
Disborough *vs.* Disborough, 51 N. J. Eq. 306.
Hunter *vs.* Hunter, 100 Ill. 477.
State ex rel. Gercke *vs.* Seddon, 93 Mo. 520.
Stork *vs.* Stork, 99 Cal. 621.

It is respectfully submitted that both the decrees appealed from should be affirmed.

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